FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MARIO ALBERTO RICHARDS-DIAZ,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the refusal to allow Petitioner to apply for simultaneous relief from removal proceedings under Immigration and Nationality Act section 240A(a) (Title 8 United States Code section 1229b(a)) and former Immigration and Nationality Act section 212(c) (Title 8 United States Code section 1182(c)), an issue that has the potential to affect thousands of immigrants in the United States, constitute an impermissible deprivation of due process?

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Mario Alberto Richards-Diaz respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW[1]

The United States Court of Appeals for the Ninth Circuit (Appendix[2] "A", *infra*, 1a) dismissed the preceding petition for rehearing on April 17, 2006. The Ninth Circuit entered its original decision (App. "B", *infra*, 2a-4a) denying the petition for review in an unreported decision on February 28, 2006. On December 10, 2003, The Board of Immigration Appeals in the United States Department of Justice's Executive Office of Immigration Review (App. "C", *infra*, 5a), affirmed without opinion the decision of the Immigration Judge (App. "D", *infra*, 6a-12a) originally entered on December 18, 2002.

JURISDICTION

The court of appeals entered its final judgment (i.e. denial of petition for rehearing) for docket number 03-74709 on February 28, 2006 (App. "A", *infra*, 1a) in an unreported decision and order. The preceding petition for review jurisdiction of the court of appeals invoked the jurisdiction of the court under 8 U.S.C. § 1252. The instant petition for writ of certiorari invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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[1]The procedural history in the present case is long and complex as will be explained below. Only the most recent three decisions are stated in this section.

[2]"Appendix" will hereinafter be referred to as "App.".

STATUTORY PROVISIONS INVOLVED

Former Section 212(c) of the Immigration and Nationality Act (hereinafter "INA"), Section 11182(c)[3] of Title 8 of the United States Code (hereinafter "U.S.C.") established that:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

In addition, INA § 240A(a), 8 U.S.C. § 1229b(a) reads, in pertinent part:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

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[3]Subsection (c) of INA § 212, 8 U.S.C. § 1182 was repealed by Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRAIRA"), Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009.

STATEMENT OF THE CASE

The application of the sections for relief from removal proceedings contained in the Immigration and Nationality Act affect thousands of immigrants each year in their quest to remain in the United States. In certain instances, the Board of Immigration Appeals, as adopted by two federal circuits and rejected by one circuit, has interpreted such provisions to allow immigrants to *simultaneously* apply for relief under multiple sections of the Immigration and Nationality Act. This case raises the important question as to whether an immigrant may concurrently apply for relief under two of these specific sections, sections that are frequently utilized in the Immigration Courts on a daily basis by thousands of immigrant each year.

A. PETITIONER AND HIS CRIMINAL AND IMMIGRATION STATUS

Petitioner, a 38 year old native and citizen of the country of Mexico, was admitted to the United States on April 25, 1975 as a lawful permanent resident. (See App. "E", *infra*, at 15a.) On February 21, 1996, Petitioner pled guilty to a violation of California Health and Safety Code (hereinafter "HS") section 11379(a) (transportation of methamphetamine). (See App. "E", *infra*, at 14a.) On March 25, 1997, Petitioner additionally plead guilty to HS § 11550A[4] (being under the

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[4]This conviction was *not* included in the first opinion of the Immigration Judge on October 10, 1997 as it apparently was not presented by counsel for the Government for introduction into the record during such proceedings. (See App. "D", *infra* at 7a.) As such, this conviction was not a basis for the primary removal charge, and later served as a basis for a lodged charge when the case was remanded to the Immigration Judge. (See App. "D", *infra* at 9a.)

influence of methamphetamine). (See App. "D", *infra* at 8a.) Subsequently, the Immigration and Nationality Service[5] issued Petitioner a Notice to Appear charging him removable from the country under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) for a conviction of an aggravated felony. (See App. "E", *infra* at 6a.)

As relief from such removal charges, Petitioner applied for: (1) a waiver under INA § 212(c) as it stood *before* the amendments of IIRAIRA as described above and (2) the newly enacted provisions of cancellation of removal INA § 240A(a), 8 U.S.C. § 1229b(a)[6] based on his long lawful residence within this country. (See App. "D", *infra* at 10a.)

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[5]On March 1, 2003, the functions of the former Immigration and Naturalization Service (hereinafter "INS") were transferred from the Department of Justice to three bureaus (United States Customs and Enforcement, United States Customs and Border Protection, and United States Citizenship and Immigration Services) in the newly formed Department of Homeland Security (hereinafter "DHS"). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). Title 8 of the Code of Federal Regulations was reorganized and amended to reflect the resulting division of jurisdictions between DHS and the Executive Office for Immigration Review, which includes the immigration court and Board of Immigration Appeals (hereinafter "BIA"), and which remains an agency within the Department of Justice under the direction of the Attorney General. See 68 Fed.Reg. 10349 (Mar. 5, 2003)(available at 2003 WL 724287).

[6]INA § 240A, 8 U.S.C. § 1229b was added by IIRAIRA § 304(a)(3).

B. PROCEEDINGS BELOW

On October 10, 1997, the Immigration Judge (hereinafter "IJ") denied Petitioner's request for relief based on his prior criminal history qualifying as an automatic bar to relief. (See App. "E", *infra* at 7a.) Petitioner then timely appealed to the Board of Immigration Appeals (hereinafter "BIA") who dismissed the appeal on January 28, 1999. (See App. "F", *infra* at 18a-19a.) Petitioner then timely requested direct review before the Ninth Circuit Court of Appeals who, under Docket No. 99-56530, issued a published decision in Richards-Diaz v. Fasano, 233 F.3d 1160 (9th Cir. 2000) affirming the decision below based on Petitioner's conviction qualifying as an aggravated felony. Despite the decision, the court remanded the case to the United States District Court for the Southern District of California to determine whether Petitioner could make a specific showing that he relied on the availability of former INA § 212(c) relief when he pled guilty to his conviction in 1996. Id. at 1166.

In the interim period, Petitioner filed a petition for writ of certiorari with this Court under Docket No. 00-1327. During the pendency of that petition, the Court decided INS v. St. Cyr, 533 U.S. 289 (2001). Based on this decision, the Court granted Petitioner's petition under Docket No. 00-1327 and remanded the case back to the Ninth Circuit for further consideration in light of the aforementioned case. (See App. "G" *infra* at 21a.) The Ninth Circuit subsequently vacated its prior order and remanded the case to the BIA on December 6, 2001. See Richards-Diaz v. Fasano, 273 F.3d 916 (9th Cir. 2001). Petitioner subsequently filed a motion to reopen with the BIA based on the aforementioned cases, which was granted on March 5, 2002 with a subsequent order remanding the case to the Immigration Court. (See App. "H", *infra* at 22a.)

Petitioner renewed his request for simultaneous relief described above before the IJ on remand. Petitioner cited controlling precedent from the BIA in Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993) as authority for the grant of simultaneous relief under INA § 240A(a) and former INA § 212(c). However, the IJ determined his two convictions disqualified him for relief independently. (See App. "D" *infra* at 10a-11a.) The BIA summarily affirmed this decision, which was ultimately affirmed by the Ninth Circuit as described above. Petitioner filed a petition for rehearing citing the expanded logic of the BIA from the Gabryelsky decision in In Re Azurin, 23 I&N Dec. 695 (BIA 2005) to allow for simultaneous relief, but the court issued a one sentence denial of such petition for rehearing that failed to address Petitioner's arguments. (See App. "A" *infra* at 1a.)

REASONS FOR GRANTING THE PETITION

I. IN DISALLOWING PETITIONER THE ABILITY TO APPLY FOR SIMULTANEOUS RELIEF THE DECISION BELOW IS INCORRECT AS DENYING PETITIONER HIS RIGHT TO DUE PROCESS.

It is well established legal principal in this Court that an alien in immigration proceedings is entitled to due process under the Fifth Amendment. See Marcello v. Bonds, 349 U.S. 302 (U.S. 1955) (citing Japanese Immigrant Case, 189 U.S. 86, 100 (U.S. 1903)) (An alien who is a *resident* of the United States cannot be deported without being accorded a fair hearing in accordance with the due process clause of the Fifth Amendment). As will be described below, the Ninth Circuit's affirmance of the decisions of the Immigration Judge and Board of Immigration Appeals to disallow Petitioner from applying for simultaneous relief ultimately deprived Petitioner of his right to due process.

Here, the Ninth Circuit determined that both of Petitioner's convictions served as bars to either form of relief requested. (See App "B" *infra* at 4a.) Contrary to the holding of the Ninth Circuit, Petitioner here should have been entitled to a waiver for 1996 trafficking crime under former INA § 212(c), and is additionally eligible for simultaneous application for cancellation of removal ("COR") under INA § 240A(a) for the 1997 methamphetamine conviction.

The BIA, in its own precedent, has held that an alien who:

> (i) on his drug conviction, is *eligible* for § *212(c)* relief from deportation but *ineligible* for § 245(a) adjustment of status; yet
> (ii) on his weapons conviction, is *eligible* for § *245(a)* adjustment of status but *ineligible* for § *212(c)* relief from deportation, can *simultaneously apply for both forms of relief.*

In re Gabryelsky, 20 I&N Dec. 750,756 (BIA 1993) (emphasis added).

Moreover, the BIA affirmed and expanded the Gabryelsky logic in In Re Azurin, 23 I&N Dec. 695 (BIA 2005). In Azurin, the alien was convicted in 1990 of shooting at an occupied motor vehicle in violation of California law. On the basis of this conviction, he was charged in 1998 with removability as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. IV 1998). Azurin, 23 I&N Dec. 695. Subsequently, the Government *lodged* a charge that he was also removable under section 237(a)(2)(C); 8 U.S.C. § 1227(a)(2)(C) because his conviction was for a firearms offense as well. Id. The BIA found "neither of these grounds

of removability has a corresponding ground of inadmissibility." Id.

The BIA then cited to this Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001) in determining "[t]he respondent pled guilty *prior* to the enactment of that statute (the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 ["ADEPA"]...respondent is *not* ineligible for a waiver as a result of ADEPA amendments." Azurin, 23 I&N Dec. at 696 (emphasis added). In addition, the BIA found:

> in the *absence* of an application for adjustment of status, the respondent would not be able to employ section 212(c) to waive the firearms and aggravated felony grounds of removability charged against him because they have no comparable grounds of inadmissibility...*Section 212(c) relief is available to waive the respondent's offense only in conjunction with an application for adjustment of status* and to the extent that his conviction would otherwise render him ineligible to adjust on the ground that he is inadmissible as an alien convicted of a crime involving moral turpitude.

Id. at 696 n.2 (emphasis added).

The BIA then addressed the "simultaneous issue" in respect to new regulations. The BIA recognized that a previous decision, Matter of Gabryelsky, 20 I&N Dec. 750, 753-54 (BIA 1993), specifically stated that an applicant for adjustment *could* apply for *simultaneous* benefits provided in section 212(c) of the Act. Azurin, 23 I&N Dec. at 697-698. Moreover, the BIA determined "this language was eliminated from the regulations, effective April 1, 1997 per Inspection

and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,383 (Mar. 6, 1997); see also 8 C.F.R. § 245.1(f) (2004). Azurin at 698 (internal quotations omitted).

Ultimately, the BIA held:

> that regulatory change does not currently preclude the respondent from combining the section 212(c) waiver with an adjustment application...8 C.F.R. § 1240.49(a) (2004)...clearly indicates that the *various waivers of inadmissibility are intended to accompany an adjustment application*. Moreover, we had approved the practice of combining a section 212(c) waiver with an adjustment application before the language regarding section 212(c) was inserted into former 8 C.F.R. § 245.1(e). See Matter of Smith, 11 I&N Dec. 325 (BIA 1965)...while the regulation's elimination of any reference to section 212(c) would have been prudent at the time of the IIRIRA's enactment, it would be contrary to the holding of St. Cyr to refuse to allow otherwise eligible aliens to seek a waiver in conjunction with an adjustment application solely because the specific regulatory language authorizing that form of relief has been deleted... [a]ccordingly, we hold that Matter of Gabryelsky, supra, has *not* been overruled as a result of the alteration of 8 C.F.R. § 245.1(f)...*we conclude that the respondent should be permitted to submit his section 212(c) waiver request with his application for adjustment of status*.

Azurin, 23 I&N Dec. at 698-699 (emphasis added).

As detailed above, Petitioner was convicted on February 21, 1996 for Transportation of a Controlled Substance in violation of HS § 11379(a), and on March 25, 1997 for violating HS § 11550A, to wit, being under the influence of a methamphetamine. Although Petitioner is seeking cancellation of removal relief under INA § 240A(a) *instead* of adjustment of status under INA § 245(a), the logic from Azurin still remains valid in that Petitioner should be eligible to apply for simultaneous relief as long as he meets the above-described requirements.

Petitioner is subject to removal based on his 1996 conviction, which the Ninth Circuit found unquestionably qualified as an aggravated felony. (See App. "B" *infra* at 4a.) As in Azurin, the Ninth Circuit held in the present case that Petitioner would *not* be eligible for a waiver for one of his offenses (i.e. his 1996 offense because it qualified as an aggravated felony). (See App. "B" *infra* at 4a.) However, the BIA's reliance in Azurin on a previous holding in Matter of Rainford, 20 I&N Dec. 598 (BIA 1992) should apply equally in the present case to Petitioner in that:

> a conviction for an offense that rendered the alien deportable *did not preclude* a showing of admissibility for purposes of an application for adjustment of status where there was no corresponding ground of inadmissibility for the crime in the statute...[t]herefore, the respondent does not need section 212(c) relief to waive either the firearms or aggravated felony charges in order to adjust his status...

Azurin 23 I&N Dec. at 696. As such, it is irrelevant whether there is a comparable ground of inadmissibility pursuant to the holding in Azurin.

In addition, like the alien in Azurin, Petitioner here is *not* ineligible for a wavier as a result of ADEPA amendments because he pled guilty to the 1996 violation, which was an aggravated felony, *"prior* to the enactment of that statute (referring to the repeal of INA § 212(c))." Azurin, 23 I&N Dec.695, 696. (emphasis added). As such, notwithstanding the 1997 conviction, Petitioner could have received a waiver under INA § 212(c) for the 1996 offense which qualified as an aggravated felony. Furthermore, due the factually identical parallels between Azurin and the present case, the "newly promulgated regulations" addressing such relief for former 212(c) relief at 8 C.F.R. § 1212.3(f)(5) are *not* intended to bar such relief in this context as well.

Lastly, the BIA's reliance on 8 C.F.R. § 1240.49(a)(2004) in Azurin to allow a "waiver of inadmissibility to accompany an adjustment application" should apply here in the cancellation of removal context. As previously stated, Respondent pled guilty to the aggravated felony *prior* to the 1996 amendments to section 212(c), and, as in Azurin, to disallow Petitioner to apply for a waiver in conjunction with his application for cancellation of removal would be "contrary to the holding of St. Cyr."[7] See Azurin, 23 I&N Dec. at 698.

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[7]It appears from the Ninth Circuit's decision the court is not of the opinion that cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a) would be able to nullify the effect of Petitioner's 1997 conviction for being under the influence of methamphetamine because of the 1996 aggravated felony conviction. As a primary note, if Petitioner *only* had his 1997 conviction, such is *not* an aggravated felony or a conviction which would disqualify him for relief under INA § 240A(a), 8 U.S.C. § 1229b(a). The cancellation of removal remedy would therefore nullify the effect of the 1997 conviction. This is relevant to the instant petition for certiorari because, as described above, Azurin

In addition, the Azurin case demonstrates that had this case still been in the Office of Immigration Review, Petitioner would be eligible for the simultaneous relief requested further making remand appropriate.

A. ANY AMBIGUITIES IN DEPORTATION STATUTES SHOULD BE CONSTRUED IN FAVOR OF RESPONDENT.

Section 240A(a) of the INA is completely devoid of a single reference to an alien's *inability* to apply for Section 240A(a) and Section 212(c) relief *simultaneously*. According to long standing principals of statutory interpretation within this Court, when a provision is omitted from a code section, it must be assumed that the exclusion was intentional. Russello v. United States, 464 U.S. 16, 23 (1983).

Section 240A clearly states how an alien *can* apply for relief. Section 240A is equally clear in what it does *not* state

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stands for the *logic* of allowing applications for *simultaneous relief*. Therefore, in the simultaneous context, Petitioner would utilize the waiver provision under former INA § 212(c), 8 U.S.C. § 1182(c), which the Ninth Circuit suggested he would be eligible for in relation to his 1997 conviction (See App "B" *infra* at 3a-4a) while *simultaneously* applying for cancellation of removal to nullify the 1997, non-aggravated felony offense

Moreover, the fact that Petitioner's 1996 conviction would be then be *waived* would take him *out* of the realm for disqualification for cancellation of removal (i.e. that which would subsequently nullify his 1997 conviction) based on an aggravated felony. This reasoning fits squarely within the logic of Azurin because Petitioner would be unable to utilize one without the grant of the other and vice versa.

in that one cannot apply for simultaneous relief. Therefore, it is contrary to the rules of statutory interpretation to read into INA section(s) 240A(a)/212(c)and conclude such provisions are hostile to Petitioner, especially when there is specific logical reasoning from Gabryelsky and Azurin to support the proposition of availability of simultaneous relief. At the very minimum, there is an ambiguity in such interpretation, and further longstanding principles of statutory interpretation mandate that any lingering ambiguities in Section(s) 240A(a)/212(c) be construed in favor of Respondent. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

II. THE DECISION ABOVE TO DISALLOW SIMULTANEOUS REQUESTS FOR RELIEF CREATES CONFLICT AMONG CIRCUITS WHO HAVE PREVIOUSLY ADOPTED THE BIA'S LOGIC IN *GABRYELSKY* AND *AZURIN*.

In rejecting Petitioner's argument for simultaneous relief under the BIA's decisions in Azurin and Gabryelsky, the Ninth Circuit essentially refused to adopt the logic of such cases, which is perfectly within its purview. Moreover, an extensive review of published decisions with the Ninth Circuit addressing such issue suggests this was essentially a matter of first impression for the court. The refusal to adopt such logic additionally coincides with the Third Circuit Court of Appeals' holding in Rodriguez-Munoz v. Gonzales, 419 F.3d 245, 248 (3d Cir. 2005) (holding that Matter of Gabryelsky, 20 I&N Dec. 750 (BIA 1993) does not allow for simultaneous requests for relief under INA § 240A(a) and former INA § 212(c)).

On the other hand, there are two federal circuits that *have* adopted the reasoning of Gabryelsky. The United States

Court of Appeals for the Second Circuit has adopted the Gabryelsky logic in Drax v. Reno, 338 F.3d 98 (2d Cir. 2003). In Drax, the Court held:

> Under *Gabryelsky*, in order to have been eligible to apply for relief before the Immigration Judge, Drax had to be simultaneously eligible to apply for both: (i) § 212(c) relief from deportation for his drug conviction; and (ii) § 245(a) adjustment of status for his weapons conviction. We hold (i) that Drax remained eligible for § 212(c) relief for his drug conviction at the time of his initial hearing before the Immigration Judge; and (ii) that although Drax was not eligible for an adjustment of status at the time of his immigration hearing, the Immigration Judge erred in holding that Drax could under no circumstances become eligible for such relief, because such relief (as described below) was a reasonable possibility if the Immigration Judge had been willing to grant Drax a continuance.
>
> Because the Immigration Judge erroneously indicated to Drax-based on his understanding that AEDPA § 440(d) applied retroactively-that no relief at all was available and that he had no discretion to allow Drax to seek "any type of a waiver," Drax was deprived of the opportunity to seek a favorable exercise of discretion through the *Gabryelsky* process that could have prevented his deportation. *We therefore grant the writ of habeas corpus to permit Drax the opportunity to petition an Immigration Judge simultaneously for discretionary relief under § 212(c) and § 245(a).*

Drax v. Reno, 338 F.3d 98, 111 (2d Cir. 2003) (emphasis

added). The Drax holding is likely in accordance with the long standing principle in the second circuit that the federal court will *defer* the BIA's interpretation of the immigration laws. See Guan Shan Liao v. United States DOJ, 293 F.3d 61, 66 (2d Cir. 2002). Furthermore, the United States Court of Appeals for the Second Circuit has specifically adopted the logic of Gabryelsky. In Snajder v. INS, 29 F.3d 1203 (7th Cir. 1994), the court recognized the legitimacy of Gabryelsky and found that an alien *could* apply for simultaneous relief. Id. at 1208.

Accordingly, it is clear there is a conflict between the circuits above in relation to adopting the logic of Azurin and Gabryelsky. This lack of coherence among the circuits inevitably leads to an alien's disparate treatment in various geographic circuits. Also, as is well known, a lower federal court such as the BIA must following the holdings of higher federal courts such as the Circuit Courts. A lack of coherence in the federal circuits described above logically could have the effect on confusion with the BIA, a tribunal responsible for hearing thousands of appeals each year. As such, the question presented in the current petition is sufficiently important for this Court to decide so as to create uniformity in the courts below.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: July 12, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-74709
Agency No. A35-001-128

[Filed April 17, 2006]

MARIO ALBERTO RICHARDS-DIAZ,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

Before: THOMPSON, T.G. NELSON, and GOULD, Circuit Judges.

ORDER

Petitioner's "Petition for Rehearing" is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-74709
Agency No. A35-001-128

[Filed February 28, 2006]

MARIO ALBERTO RICHARDS-DIAZ, Petitioner,	)
v.	)
ALBERTO R. GONZALES, Attorney General, Respondent.	)

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A35-001-128.

Before: THOMPSON, T.G. NELSON, and GOULD, Circuit Judges.

MEMORANDUM*

Submitted February 9, 2006**
Pasadena, California

Mario Alberto Richards-Diaz petitions for review of the Board of Immigration Appeals' affirmance of the Immigration Judge's denial of his applications for a waiver of deportation under 8 U.S.C. § 1182(c), and cancellation of removal under 8 U.S.C. § 1229b. This court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) and we deny his petition for review.

Even if Richards-Diaz is eligible for a discretionary waiver for his 1996 offense, he is still removable because he is ineligible for a discretionary waiver for his 1997 offense or for cancellation of removal. Richards-Diaz does not qualify for a discretionary waiver for his 1997 offense because he was convicted of being under the influence of methamphetamine after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 440(d) went into effect.[1] Under AEDPA as it existed then, aliens convicted of certain enumerated offenses, including drug-related crimes, were not

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] 8 U.S.C. § 1182(c) (1996), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(b), Pub. L. No. 104-208, 110 Stat. 3009-597.

eligible for discretionary waivers.[2] Therefore, the Immigration Judge properly concluded that Richards-Diaz was ineligible for a discretionary waiver of deportation for his 1997 offense.

The Immigration Judge also properly denied Richards-Diaz's application for cancellation of removal. Section 1229b(b)(1)(C) prohibits cancellation of removal when an alien is convicted of an aggravated felony.[3] Richards-Diaz does not dispute that on February 21, 1996, he was convicted of an aggravated felony, transportation of a controlled substance (methamphetamine). Therefore, cancellation of removal is not available to him.

Because Richards-Diaz is ineligible for either form of relief, we deny his petition for review.

PETITION DENIED.

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[2] *Id.*

[3] 8 U.S.C. § 1229b(b)(1)(C).

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A35-001-128-San Diego

[Filed December 10, 2003]

In re: RICHARDS-DIAZ, MARIO ALBERTO)

IN REMOVAL PROCEEDINGS
APPEAL

ORDER

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File A 35 001 128

[Dated December 18, 2002]

In the Matter of	)
MARIO RICHARDS-DIAZ,	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act; alien convicted after admission of an aggravated felony, a drug trafficking crime

Section 237(a)(2)(B)(I) of the Immigration and Nationality Act; alien who any time after admission has been convicted of a violation of a law related to a controlled substance

APPLICATION: Section 212(c) waiver pursuant to the Supreme Court of the United States

decision in *INS v. St. Cyr*, 121 S. Ct 2271 (2001)

SECOND ORAL OPINION AND ORDER OF THE IMMIGRATION JUDGE

This case was before the undersigned in 1997. On October 10, 1997, I issued an oral decision opinion and order finding the respondent removable as charged and denying a Section 212(c) waiver. The Court also denied at that time an application for cancellation of removal for a permanent resident under Section 240A(a) of the Immigration and Nationality Act.

The cancellation remedy was denied because the Court found that due to the respondent's two convictions of controlled substance offenses, namely, a possession of phencyclidine (PCP) on June 16, 1987, and a conviction of transportation of methamphetamine on February 21, 1996, resulted in the finding that the respondent had been convicted of a drug trafficking crime. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

The respondent appealed to the Board of Immigration Appeals. The Board of Immigration Appeals decided, on January 28, 1999, to dismiss his appeal.

The respondent petitioned for review before the Ninth Circuit Federal Court of Appeals. The Ninth Circuit Federal Court of Appeals issued a published decision in the case of *Richards-Diaz v. Fasano*, 233 F.3d 1160 (9th Cir. 2000) that the respondent was not eligible for cancellation because he was convicted of an aggravated felony as was concluded by the Court and the BIA. However, they found that the Court had to conduct an evidentiary hearing to determine whether

respondent could make a specific showing that he relied on the availability of 212(c) when he pled guilty to the transportation of methamphetamine conviction in 1996.

While the case was being considered by the District Court in light of the Ninth Circuit decision, and the parties were debating how to proceed and implement that decision, the Supreme Court of the United States rendered the decision of *INS v. St. Cyr*, which was published in the summer of 2001. The respondent apparently filed a motion to reopen with the Board of Immigration Appeals. This was due in part to some kind of stipulation that was entered between respondent and the U.S. attorneys. The Board, although denying the motion to reopen as untimely, did grant it with respect to the new decision of *INS v. St. Cyr*, which they believed would apply to the respondent's case, and sent the case to this Court for the purpose of affording the respondent an opportunity to apply for relief under Section 212(c) of the Act.

The case was then set for a preparatory master calendar before the undersigned and at that point the Service first indicated to this Court that there was another conviction that had not been considered in the prior proceedings, whether in Immigration Court or in Federal Court, which was related to an under the influence of methamphetamine conviction. The respondent provided supplementary documentation, which included a 212(c) application along with a cancellation application. The Service, in turn, provided a copy of conviction records related to a conviction for being under the influence of methamphetamine in violation of California Health and Safety Code Section 11550A. According to these records, which are marked and admitted as Exhibit R-5, the respondent pled guilty to a count of being under the influence of methamphetamine and a count of driving, when the driving privileges has been suspended because of a prior DUI

conviction. The respondent made this plea agreement and signed it on March 25, 1997. It was also accepted by the State Municipal Court on March 25, 1997. He was sentenced to 360 days, suspended. He had to serve 120 days in county jail for count 1 and 90 days in county jail for count 3, concurrently to the time imposed in count 1.

The Service lodged an additional charge and an additional allegation pertaining to that March 25, 1997 conviction. This was filed on October 11, 2002. This is the first time that the Court is officially aware of the fact that there was another conviction and as I noted in the record, it would have saved a lot of problems and utilization of resources, considering the history of this case, if everyone concerned would have been aware of that 1997 conviction, because it does have a significant impact on the case and the availability of relief.

The respondent's counsel stated that he was not aware of that conviction. He had misunderstood his client to refer to only a driving without a license, or with a suspended license, conviction. In examining the record, it appears that the INS officer who prepared the initial documents, and filed the charging document, believed that at the time he did so, the respondent had still not been convicted of the under the influence of methamphetamine arrest, which apparently motivated the transfer of custody from the State to the Federal Government. However, from the conviction document, it appears that the respondent, at the time that he was transferred to the custody of the INS, had already been convicted of that '97 under the influence offense. Apparently the paperwork had not yet found its way to the Federal Government record.

It is unfortunate that this conviction did not come to light earlier in these proceedings. It would have changed the

analysis dramatically. I say this because I do not believe that the respondent would be eligible for a 212(c) waiver, under the decision of *INS v. St. Cyr*, to waive this '97 conviction. The *St. Cyr* decision indicates that one must look at the existing law at the time the respondent pled guilty to determine if the 212(c) relief is available. At the time the respondent pled guilty for the under the influence of methamphetamine conviction, the existing law at that time precluded the availability of Section 212(c) waivers for aliens who have been convicted of controlled substance offenses. A conviction for under the influence of methamphetamine is a conviction of a controlled substance offense. Therefore, the respondent could not waive under the 212(c) waiver and the law existing at that time, the under the influence conviction, even assuming he could waive the prior controlled substance and drug trafficking convictions of '96 and '87.

Respondent argues that under the ruling by the Board of Immigration Appeals in the case of *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993), the respondent could combine the Section 212(c) waiver with a cancellation of removal under Section 240A(a) relief and have all the convictions waived.

I disagree with the respondent's interpretation of the *Gabryelsky* case as applicable to this situation before us. It is clearly not applicable. We are talking about a different law, and the *Gabryelsky* decision dealt with adjustment of status and Section 212(c). At the time of the *Gabryelsky* decision the remedy of cancellation did not even exist, therefore the decision offers very little guidance on how to interpret the new cancellation remedy to a situation such as the one before us.

I believe the language of the statute of the cancellation remedy is clear and precludes using the cancellation remedy

to cancel the ground of removability based on the 1997 conviction. This is so for two reasons. First of all, the cancellation of removal remedy for permanent residents is not available for permanent residents who have been convicted of aggravated felonies. The respondent has been convicted of an aggravated felony. This finding has not been disturbed by any of the appellate decisions that have considered this case, either in Immigration Court or in Federal Court. I do not believe that, at least the record before me shows, that the finding that respondent has been convicted of an aggravated felony has been seriously challenged even by respondent. Rather, the focus of respondent has been that even assuming that he was convicted of a drug trafficking type offense and/or an aggravated felony, that he is eligible for a 212(c) waiver.

The cancellation remedy is also not available for the respondent because assuming he is successful in obtaining the 212(c) waiver for the convictions that under *St. Cyr*, he would be eligible to use a waiver for. Should that be the case, then the cancellation could not be used to waive the 1997 conviction because by the clear terms of the cancellation statute, cancellation is not available to those legal residents who have been previously granted a Section 212(c) waiver. Therefore, the respondent could not use the cancellation to cancel the ground of removability based on the '97 controlled substance conviction.

There appears to be no other relief available for the respondent and I note that this case was remanded only for the limited purpose of the 212(c) *St. Cyr* remedy. I incorporate the findings made in my prior decision, modified by this decision, and make the following findings and issue the following orders.

ORDER

Respondent is found to be removable as charged.

Respondent's application for Section 212(c) is hereby denied.

Respondent's application for cancellation of removal is hereby denied.

Respondent is ordered removed to Mexico based on the charge in the charging document.

/s/_____
IGNACIO P. FERNANDEZ
Immigration Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File A 35 001 128

[Dated October 10, 1997]

In the Matter of	)
MARIO RICHARDS-DIAZ,	)
A/K/A	)
MARIO ALBERTO	)
RICHARD-DIAZ	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE OF Removability Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended (convicted of an aggravated felony).

APPLICATION: Section 212(c) waiver.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 29-year-old male, native and citizen of Mexico who was charged with removability as noted above. The respondent, through counsel, admitted to all the factual allegations in the charging document. He denied removability as a matter of law. The respondent also applied and submitted an application for a Section 212(c) waiver under the Immigration and Nationality Act, as it stood before the amendments of September 30, 1996. *See* Exhibit 5.

The respondent was convicted in the Superior Court of California on February 21, 1996, for the offense of transportation of methamphetamine in violation of Section 11379(a) of the California Health and Safety Code. This is the conviction charged in the charging document. *See* Exhibit 1. The respondent was also convicted of possession of phencyclidine (PCP) in violation of Section 11377(a) of the California Health and Safety Code on June 16, 1987. *See* Exhibit 3.

The respondent argues that he should be allowed to apply for a Section 212(c) waiver because the Immigration and Naturalization Service did not follow their guidelines and did not issue a detainer against the respondent when he was incarcerated in county jail early in February of 1996. The respondent contends that the Service follows this procedure regularly and once the detainer is placed on the prisoner, they then contact the prisoner and issue a charging document. The respondent argues that had the Service used their customary procedure and followed their guidelines and placed a detainer some time in February of 1996, they would have issued an Order to Show Cause against the respondent, presumably in either February or March of 1996. Had they done this, the respondent argues, he would be in a better position to seek

relief. Respondent contends, through counsel, that even though the amendments brought about by Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of April 24, 1996, also precluded eligibility for the 212(c) waiver relief to persons convicted of aggravated felonies who were found deportable as such, nonetheless, respondent believes that there is a possibility that the 9th Circuit Court of Appeals will overturn the ruling interpreting said amendment as applicable to all pending cases. *See Matter of Soriano*, Int. Dec. 3289 (A.G., Feb. 21, 1997).

The respondent does not argue that the crime of transporting methamphetamine is a not an aggravated felony. The Court finds that the crime of transporting methamphetamine is a drug-trafficking crime, and is thus an aggravated felony as defined in the statute at Section 101(a)(43). *See United States v. Lomas*, 30 F.3d 1191 (9th Cir. 1994). Furthermore, in light of the fact that the respondent has been convicted previously of another possession of a controlled substance type of crime, and that his second conviction for the transportation of methamphetamine can also be construed as a form of possession, the respondent may also be considered to have been convicted of a drug-trafficking crime as defined in the statute. *See Matter of Davis*, 20 I.N. Dec. 536 (BIA 1992). After examining the evidence in this case, the Court is satisfied that the evidence is clear and convincing that respondent has been convicted of an aggravated felony and that he is removable as an aggravated felon. The Court does find that respondent is removable as charged.

It should be noted that the respondent, according to the allegations which have not been disputed, was admitted to the United States on April 25, 1975, as an immigrant. According to the information in his 212(c) application, he has many

family members in the United States. His parents are legal residents. His brothers are U.S. citizens. His wife and two daughters are also U.S. citizens. The wife and daughter live with him in the United States. The parents and siblings also live in the United States.

Although the respondent may meet some of the requirements of eligibility for the Section 212(c) waiver relief and the Section 240A(a) cancellation of removal for certain permanent residents, because of his aggravated felony conviction and the finding of deportability on that basis, the Court must find that the respondent is not eligible for the relief of cancellation of removal. The Court also cannot consider the Section 212(c) relief in these proceedings because these are removal proceedings, and according to the transition rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 at Section 309, that law must apply to cases filed on or after April 1, 1997, and such is the case in the present proceedings which were filed in June of 1997.

The Court finds that it does not have jurisdiction to entertain the equal protection clause arguments raised by the respondent as far as the timing of the issuance of the charging document in his case by the Immigration and Naturalization Service. Furthermore, the determination of when and where and how to file a charging document is left to the province of the enforcement arm of the Attorney General, the Immigration and Naturalization Service. And the Court has no jurisdiction on that matter either. In addition, it appears to the Court that at this point in time, respondent has not shown how he was prejudiced by the issuance of the charging document at a later date. This is so because had they issued the charging document in February of 1996, Congress changed the law in April of 1996, the case would have been pending and this new

law would have applied to the respondent, thus precluding him from applying for the 212(c) waiver because of his aggravated felony conviction.

It does not appear that the respondent is eligible for the relief of voluntary departure either under Section 240B of the Immigration and Nationality Act, as amended, in light of his aggravated felony conviction. Therefore, and for the above-mentioned reasons, the Court now rules as follows:

ORDER

Respondent is found removable as charged.

Respondent's applications for relief are denied.

Respondent is ordered removed from the United States to Mexico based on the charge in the charging document. So ordered,

/s/_____
IGNACIO P. FERNANDEZ*
Immigration Judge

* ORAL decision transcript reviewed, corrected and signed on 1/14/98.

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A35-001-128-San Diego

[Filed January 28, 1999]

In re: MARIO ALBERTO	)
RICHARD-DIAZ a.k.a.	)
MARIO ALBERTO	)
RICHARDS-DIAZ	)
	)

IN REMOVAL PROCEEDINGS
APPEAL

ORDER

PER CURIAM. The respondent is statutorily ineligible for cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), because he has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43(B). Since he is in removal proceedings, a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c), is not a form of relief that is available. *See* section 304(b) of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). On appeal, the respondent has argued that the Immigration and Naturalization Service should have instituted proceedings against him at an earlier date. The Service's decisions regarding the commencement of proceedings are not reviewable by this Board. *See, e.g., Matter of Ramirez-Somera*, 20 I&N Dec. 564 (BIA 1992), and cases cited therein.

Accordingly, the appeal is dismissed.

/s/ _____
FOR THE BOARD

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 00-1327

[Filed June 29, 2001]

ADELE FASANO,	)
DISTRICT DIRECTOR,	)
IMMIGRATION and	)
NATURALIZATION SERVICE,	)
Petitioner	)
	)
v.	)
	)
MARIO RICHARDS-DIAZ	)
	)

ORDER ALLOWING CERTIORARI.
Filed June 29, 2001.

The petition herein for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 00-1327

[Filed June 29, 2001]

ADELE FASANO, DISTRICT DIRECTOR, IMMIGRATION and NATURALIZATION SERVICE, Petitioner	)
v.	)
MARIO RICHARDS-DIAZ	)

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Immigration and Naturalization Service v. St. Cyr,* 533 U.S.__ (2001).

June 29,2001

APPENDIX H

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A35-001-128-San Diego

[Filed March 5, 2002]

In re: RICHARDS-DIAZ, MARIO ALBERTO)

IN REMOVAL PROCEEDINGS
MOTION

ORDER

PER CURIAM. This case was last before the Board on January 28, 1999, at which time we dismissed the respondent's appeal from an Immigration Judge's October 10, 1997, decision. On February 11, 2002, the respondent filed a motion to reopen proceedings, contending that he should be allowed to pursue the application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Subsequent to this Board's decision, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who pled guilty prior to April 24,

1996. In this case, the respondent was convicted following a plea of guilty, which was entered prior to the enactment of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See INS v. St. Cyr*, 121 S.Ct. 2271 (2001). The respondent's motion is untimely. 8 C.F.R. § 3.2 (2001). However, in light of the Supreme Court's decision in *St. Cyr*, *supra*, which involves a fundamental change in the interpretation and application of AEDPA, we shall exercise our discretionary authority and reopen the instant matter sua sponte. *See Matter of G-D-*, Interim Decision 3418 (BIA 1999); *Matter of X-G-W-*, Interim Decision 3352 (BIA 1998). Accordingly, the respondent's motion is granted, the proceedings are reopened, and the record is remanded to the Immigration Court in order that the respondent may be afforded an opportunity to apply for relief under section 212(c) of the Act.

/s/_____
FOR THE BOARD

No. 06-66

In the Supreme Court of the United States

MARIO ALBERTO RICHARDS-DIAZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996) and 8 U.S.C. 1229b.

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In the Supreme Court of the United States

No. 06-66

MARIO ALBERTO RICHARDS-DIAZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 2a-4a) is not published in the *Federal Reporter* but is reprinted in 171 Fed. Appx. 10. The order of the Board of Immigration Appeals (Pet. App. 5a) and the opinion and order of the immigration judge (Pet. App. 6a-12a) are unreported. Prior opinions of the court of appeals are reported at 233 F.3d 1160 and 273 F.3d 916. Prior orders of the Board of Immigration Appeals (Pet. App. 18a-19a, 22a-23a) and a prior decision of the immigration judge (Pet. App. 13a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2006. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a). The petition for a writ

of certiorari was filed on July 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988), which was repealed in 1996, authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. Although, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony or a controlled-substance offense, without regard to the amount of time spent in prison. Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that same year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes ineligible for relief any alien who has been convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3).

Section 240A also makes ineligible for relief any alien who has previously obtained relief under Section 240A or Section 212(c). 8 U.S.C. 1229b(c)(6).

2. Petitioner is a native and citizen of Mexico. In April 1975, he entered the United States as an immigrant. In February 1996, he pleaded guilty in California court to transportation of methamphetamine. He was sentenced to 270 days of imprisonment. In June 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner.* It alleged that he was removable under 8 U.S.C. 1227(a)(2)(A)(iii) because transportation of methamphetamine is an aggravated felony. Admin. R. 330, 363; Gov't C.A. Br. 4-5; Pet. App. 14a.

3. In October 1997, an immigration judge (IJ) found petitioner removable as charged, denied his applications for relief from removal, and ordered him removed to Mexico. Pet. App. 13a-17a. The IJ ruled that petitioner was ineligible for discretionary relief from removal under Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), because that provision was repealed before removal proceedings were commenced, and that petitioner was ineligible for cancellation of removal under Section 240A of the INA because he had been convicted of an aggravated felony. Pet. App. 16a. The Board of Immigration Appeals (BIA) reached the same conclusion and dismissed petitioner's appeal. *Id.* at 18a-19a.

Petitioner thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California. Gov't C.A. Br. 6. The

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* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

district court denied the petition. *Ibid.* The court of appeals vacated the district court's decision in part, however, and remanded for a determination of whether petitioner had specifically relied on the availability of discretionary relief from removal when he entered his guilty plea in February 1996, four months before AEDPA's effective date. *Richards-Diaz* v. *Fasano*, 233 F.3d 1160 (9th Cir. 2000). This Court then granted the government's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *St. Cyr*, *supra*. *Fasano* v. *Richards-Diaz*, 533 U.S. 945 (2001). *St. Cyr* held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

On remand, the court of appeals held that, in light of *St. Cyr*, petitioner was eligible to apply for discretionary relief from removal under Section 212(c). *Richards-Diaz* v. *Fasano*, 273 F.3d 916 (9th Cir. 2001). It therefore vacated the judgment of the district court and remanded the case with directions to remand the case to the BIA for consideration of petitioner's application for Section 212(c) relief. *Ibid.* The BIA subsequently reopened the proceedings and remanded the case to the IJ so that petitioner could apply for relief under Section 212(c). Pet. App. 22a-23a.

While the case was pending before the IJ, the government became aware that, in March 1997, petitioner had pleaded guilty in California court to using and being under the influence of methamphetamine, for which he served 120 days in jail. In October 2002, the INS filed

an additional charge of removability on the basis of that conviction. It alleged that petitioner was removable under 8 U.S.C. 1227(a)(2)(B)(i) because using and being under the influence of methamphetamine is a controlled-substance offense. Admin. R. 66, 71; Gov't C.A. Br. 5, 7; Pet. App. 8a-9a.

4. Following the remand and the filing of the additional charge, the IJ again found petitioner removable, again denied his applications for relief from removal, and again ordered him removed to Mexico. Pet. App. 6a-12a. The IJ ruled that petitioner was ineligible for discretionary relief from removal under Section 212(c) of the INA because he had pleaded guilty to using and being under the influence of methamphetamine after the effective date of AEDPA, which made ineligible for Section 212(c) relief any alien convicted of a controlled-substance offense. *Id.* at 10a. The IJ rejected petitioner's contention that, under the BIA's decision in *In re Gabryelsky*, 20 I. & N. Dec. 750 (1993), he "could combine the Section 212(c) waiver with a cancellation of removal under Section 240A[] relief and have all the convictions waived." Pet. App. 10a. The IJ reasoned that *Gabryelsky* "dealt with adjustment of status and Section 212(c)," not cancellation of removal and Section 212(c). *Ibid.* The IJ also explained that, for two reasons, Section 240A "precludes using the cancellation remedy to cancel the ground of removability based on the 1997 conviction": first, the remedy is not available to aliens who have been convicted of an aggravated felony, and petitioner was convicted of the aggravated felony of transportation of methamphetamine in 1996; second, the remedy is not available to aliens who have been granted Section 212(c) relief, and petitioner's *Gabryelsky* argument

depends on his obtaining Section 212(c) relief with respect to his 1996 conviction. *Id.* at 10a-11a.

The BIA affirmed the IJ's decision without opinion. Pet. App. 5a.

5. The court of appeals denied petitioner's petition for review in an unpublished memorandum. Pet. App. 2a-4a. The court held that, even if petitioner was eligible for Section 212(c) relief in connection with his 1996 conviction, he was ineligible for Section 212(c) relief in connection with his 1997 conviction and was ineligible for cancellation of removal under Section 240A. *Id.* at 3a. The court concluded that petitioner was ineligible for Section 212(c) relief in connection with his 1997 conviction because the conviction postdated AEDPA's effective date, AEDPA made aliens convicted of a controlled-substance offense ineligible for Section 212(c) relief, and petitioner's 1997 conviction was for a controlled-substance offense. *Id.* at 3a-4a. The court concluded that petitioner was ineligible for cancellation of removal under Section 240A because aliens previously convicted of an aggravated felony are ineligible for such relief and petitioner's 1996 conviction was for an aggravated felony. *Id.* at 4a.

ARGUMENT

Relying on *In re Gabryelsky*, 20 I. & N. Dec. 750 (B.I.A. 1993), petitioner contends (Pet. 6-15) that he was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the INA. The IJ, BIA, and court of appeals all correctly rejected that contention, and further review is unwarranted.

1. *In re Gabryelsky* involved an alien who had been convicted of two offenses—a drug offense and a firearms offense—and wished to obtain two types of re-

lief—discretionary relief from deportation under Section 212(c) of the INA and adjustment of status under Section 245 of the INA, 8 U.S.C. 1255. The problem for the alien was this: On the one hand, Section 212(c) "may be used to waive [deportation] for * * * drug offenses," but Section 212(c) relief "is barred where the applicant has a firearms conviction." *Drax* v. *Ashcroft*, 178 F. Supp. 2d 296, 304 (E.D.N.Y. 2001) (Weinstein, J.). That is because Section 212(c) applies only when "the ground of deportability charged is * * * also a ground of [exclusion]," *Gabryelsky*, 20 I. & N. Dec. at 754, and, while a conviction of a drug offense is listed as a ground of exclusion in Section 212(a) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(II), "there is no exclusion ground corresponding to the deportation ground for conviction of a firearms offense," *Gabryelsky*, 20 I. & N. Dec. at 753-754. On the other hand, Section 245 "may be used to adjust the status of a lawful permanent resident, removing [firearms] offenses from their record for purposes of immigration hearings," but Section 245 "may not be used where the applicant has a record of drug offenses." *Drax*, 178 F. Supp. 2d at 304. That is because Section 245 requires that an alien be "admissible," 8 U.S.C. 1255(a), and, while an alien convicted of a firearms offense is admissible, *In re Rainford*, 20 I. & N. Dec. 598 (B.I.A. 1992), an alien convicted of a drug offense is "inadmissible," 8 U.S.C. 1182(a)(2)(A)(i)(II).

As Judge Weinstein has explained, the solution adopted by the BIA was this:

> *Gabryelsky* allows the [alien] to consolidate both the 212(c) and 245 discretionary hearings into a single hearing. This creates the assumption that the two hearings happen at the same moment. Because of this simultaneous determination, the immigration

> judge can consider the section 212(c) hearing as not barred by the weapons conviction, since the judge is at that exact moment deciding also whether to waive the weapons conviction. And he can consider the section 245 hearing as not barred by the drug conviction, since he is also concurrently determining whether to waive the drug charge. Only if the judge decides to waive both charges is the petitioner not deported.

178 F. Supp. 2d at 304.

In adopting that rule in *Gabryelsky*, the BIA relied on two regulations. See 20 I. & N. Dec. at 754-756. The first was 8 C.F.R. 242.17(a) (1993) (since redesignated as 8 C.F.R. 1240.49(a)), which provided, in part, that,

> [i]n conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes he meets the eligibility requirements for a waiver of the ground of inadmissibility, he may apply to the immigration judge for such waiver.

The second regulation was 8 C.F.R. 245.1(e) (1993), titled "Concurrent applications to overcome exclusionary grounds," which provided, in part, that "[a]ny applicant for adjustment under this part" (which governs adjustment of status) "may also apply for the benefits of section 212(c) of the [INA]." The BIA reasoned that, under Section 245.1(e), "there is no requirement that section 212(c) of the [INA] separately and independently waive all grounds of deportability in order for an applicant for adjustment of status to concurrently apply for relief under sections 245 and 212(c)." 20 I. & N. Dec. at 755.

The BIA also reasoned that "such a reading would render the regulation * * * meaningless, for there would be no need to concurrently apply for adjustment of status to overcome exclusionary grounds if a section 212(c) waiver would independently waive all grounds of inadmissibility." *Ibid.*

2. The regulations on which the BIA relied in *In re Gabryelsky* are not applicable to the situation here, and there are no comparable regulations that are. *Gabryelsky* therefore provides no basis for concluding that petitioner was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the INA. Indeed, unlike the type of relief at issue in *Gabryelsky* (adjustment of status), which was inherently related to Section 212(c) relief, both by statute and by regulation, the type of relief at issue here (cancellation of removal) has *replaced* Section 212(c) relief.

Petitioner places considerable weight (Pet. 7-12) on the BIA's decision in *In re Azurin*, 23 I. &. N. Dec. 695 (2005). But that case merely reaffirmed that an alien may simultaneously apply for relief under Sections 212(c) and 245 despite a change in the regulations. The BIA observed that *Gabryelsky* had relied on the statement in 8 C.F.R. 245.1(e) (1993) that "[a]ny applicant for adjustment of status * * * may also apply for the benefits of section 212(c)," and that that language had been eliminated as of April 1, 1997, when Section 245.1(e) was redesignated as 8 C.F.R. 245.1(f). *In re Azurin*, 23 I. & N. Dec. at 697-698. The BIA explained, however, that that regulation "was not the exclusive basis for [its holding] in *Gabryelsky*," and that it had "also relied on language in former 8 C.F.R. § 242.17(a) (1993)," which "still exists in the current version of the regulation." *Id.* at 698. That language, the BIA said, "clearly indicates that

the various waivers of inadmissibility are intended to accompany an adjustment application." *Ibid.* As already mentioned, 8 C.F.R. 242.17(a) (1993) is not applicable to the situation here, and there are no comparable regulations that are.

3. Even if *In re Gabryelsky* applied beyond the context of adjustment of status, petitioner still would not be eligible for "simultaneous" relief from removal. As petitioner acknowledges (Pet. 7), the holding of *Gabryelsky* is that

> an alien * * * who
>
> > (i) on his *drug* conviction, is *eligible* for § 212(c) relief from deportation but *ineligible* for § 245(a) adjustment of status; yet
> >
> > (ii) on his *weapons* conviction, is *eligible* for § 245(a) adjustment of status but *ineligible* for § 212(c) relief from deportation,
>
> can simultaneously apply for both forms of relief.

Drax v. *Reno*, 338 F.3d 98, 111 (2d Cir. 2003). By analogy, petitioner would have to show that, on his 1996 conviction for transportation of methamphetamine, he is eligible for Section 212(c) relief but ineligible for cancellation of removal, and that, on his 1997 conviction for using and being under the influence of methamphetamine, he is eligible for cancellation of removal but ineligible for Section 212(c) relief. Petitioner could not make that showing. As the court of appeals correctly held (Pet. App. 3a-4a), even if petitioner is eligible for Section 212(c) relief with respect to his 1996 conviction, he is not eligible for Section 212(c) relief *or* cancellation of removal with respect to his 1997 conviction.

As to Section 212(c) relief: Petitioner pleaded guilty to using and being under the influence of methamphetamine in March 1997, after AEDPA's effective date (April 24, 1996), see Pub. L. No. 104-132, 110 Stat. 1214. Under Section 212(c) as amended by AEDPA, an alien convicted of a controlled-substance offense is ineligible for discretionary relief from removal, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, and using and being under the influence of methamphetamine is a controlled-substance offense for those purposes, see 8 U.S.C. 1227(a)(2)(B)(i) (excluding from category of offense "relating to a controlled substance" only "a single offense involving possession for one's own use of 30 grams or less of marijuana").

As to cancellation of removal: An alien is ineligible for cancellation of removal if he has been "convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3). Because petitioner was convicted of transportation of methamphetamine in 1996, and because the definition of "aggravated felony" includes "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B), petitioner has been convicted of an aggravated felony. Indeed, he does not contend otherwise. See, *e.g.*, Pet. App. 4a (decision below) (noting that petitioner "does not dispute" that he was convicted of an aggravated felony in 1996).

The 1996 conviction would be a bar to cancellation of removal even if one assumed that petitioner would be granted Section 212(c) relief with respect to that conviction. As the BIA has explained, "a grant of section 212(c) relief 'waives' the finding of excludability or deportability [but not] the basis of the excludability itself," such that "the crimes alleged to be grounds for excludability or deportability do not disappear from the aliens' record for immigration purposes." *In re Bal-*

deras, 20 I. & N. Dec. 389, 391 (1991). The Ninth Circuit has reached the same conclusion. See *Molina-Amezcua* v. *INS*, 6 F.3d 646, 647 (1993) (per curiam) ("A waiver of deportation gives the alien a chance to stay in the United States despite his misdeed, but it does not expunge the conviction. The blemish remains on his record, to be considered if and when the alien again gives the Attorney General cause to examine his deportability.").

4. No court of appeals has held that *In re Gabryelsky* applies to a case of this type. And the only court of appeals to address the question has held that it does not. In *Rodriguez-Munoz* v. *Gonzales*, 419 F.3d 245 (2005), the Third Circuit rejected the contention that an alien convicted of sale of drugs in 1992 and possession of drugs in 2000 "would be entitled to relief if permitted to simultaneously apply for a waiver of removal under § 212(c) and for cancellation of removal under § 240A." *Id.* at 247. The court found *Gabryelsky* inapposite, because, among other things, the BIA's holding in that case was based on "a regulation permitting combined § 245(a) and § 212(c) applications." *Id.* at 248. The court also found that the alien would not be entitled to "simultaneous" relief even if *Gabryelsky* applied outside the context of adjustment of status. The court reasoned that, even if the alien were eligible for Section 212(c) relief with respect to his 1992 conviction, he would be ineligible for cancellation of removal with respect to his 2000 conviction, because the 1992 conviction was for an aggravated felony, thereby disqualifying him from seeking cancellation of removal with respect to the 2000 conviction. *Ibid.*

Petitioner suggests (Pet. 14-15) that the Second Circuit and Seventh Circuit have extended the holding of

Gabryelsky to the situation at issue here. But the decisions on which he relies, *Drax*, 338 F.3d at 111-119, and *Snajder* v. *INS*, 29 F.3d 1203, 1208 (7th Cir. 1994), applied *Gabryelsky* to "simultaneous" applications for Section 212(c) relief and adjustment of status, the circumstances that were present in *Gabryelsky* itself. Those circumstances are not present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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